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NORTHERN DISTRICT OF CALIFORNIA

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NATIONAL FIRE INSURANCE COMPANY OF
HARTFORD, SUCCESSOR BY MERGER TO
TRANSCONTINENTAL INSURANCE COMPANY,
ERRONEOUSLY SUED AS TRANSCONTINENTAL
INSURANCE COMPANY

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SBA

NATIONAL FIRE INSURANCE
COMPANY OF HARTFORD,
SUCCESSOR BY MERGER TO
TRANSCONTINENTAL INSURANCE
COMPANY,

Plaintiff,

vs.

MARK ROBERTS, BEVERLY
ROBERTS, and DOES 1 through 20,

Defendants.

CV 08

Civil Action No.:

2957

COMPLAINT FOR DECLARATORY
RELIEF; DEMAND FOR JURY TRIAL;
AND CERTIFICATION OF
INTERESTED ENTITIES

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1 Plaintiff, National Fire Insurance Company Of Hartford, Successor By Merger To
2 Transcontinental Insurance Company ("National Fire"), as and for its Complaint for Declaratory
3 Relief against Defendants, Mark Roberts and Beverly Roberts (the "Roberts"), alleges as follows:

4 **THE PARTIES**

5 1. Plaintiff National Fire, successor by merger to Transcontinental Insurance Company,
6 is an Illinois corporation with its principal place of business in Chicago, Illinois. At all relevant
7 times, National Fire was and is authorized to do business in the State of California. At all times prior
8 to January 1, 2008, Transcontinental Insurance Company was authorized to do business in the State
9 of California.

10 2. Defendants Mark and Beverly Roberts are citizens of California residing in the City of
11 Hillsborough.

12 **JURISDICTION & VENUE**

13 3. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332 because
14 there is complete diversity of citizenship between the parties and the amount in controversy exceeds
15 \$75,000.00, exclusive of costs.

16 4. Venue is proper in the Northern District of California pursuant to 28 U.S.C. § 1391 in
17 that a substantial portion of the events giving rise to the claims at issue in this Complaint took place
18 in this district.

19 **CLAIM FOR DECLARATORY RELIEF**

20 5. This is an action for declaratory judgment pursuant to 28 U.S.C. § 2201 for the
21 purpose of determining a question in actual controversy between the parties.

22 6. There is a real, substantial and justiciable issue in controversy between the parties
23 hereto with respect to the existence of insurance coverage available to the Roberts under the
24 Personal Catastrophe Liability policy number CPA 167048273 issued by National Fire's
25 predecessor to Mark A. Roberts for the policy period from November 1, 2005 through November 1,
26 2006 (the "Transcontinental Policy").

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1 7. A judicial determination and a declaration of the rights and obligations of the parties
2 is necessary and appropriate at this time because National Fire has no adequate remedy at law which
3 will resolve the current controversy.

4 **GENERAL ALLEGATIONS**

5 **A. The Underlying Action**

6 8. On or about October 19, 2006, minor Troy Spielberg, by his Guardian Ad Litem
7 Barbara Spielberg, filed a complaint against the Roberts in the Superior Court of California, County
8 of San Mateo, under case number CIV 458423 (the "Underlying Action").

9 9. The Underlying Action alleges that on March 4, 2006, Spielberg was a passenger in a
10 Lexus automobile driven by Mark Roberts while Roberts was willfully and unlawfully under the
11 influence of alcohol and/or drugs, and with a willful, wanton and reckless disregard for the safety of
12 Spielberg.

13 10. Spielberg contends that as a proximate result of Mark Roberts' conduct, the vehicle
14 went off the road and flipped over, causing personal injury to Spielberg.

15 11. With respect to Beverly Roberts, Spielberg alleges that she negligently entrusted the
16 vehicle to her husband and allowed him to drive despite knowing that he was intoxicated and
17 incapable of operating the vehicle safely.

18 12. Spielberg further alleges that Beverly Roberts acted with a willful, wanton and
19 reckless disregard for Spielberg's safety and with knowledge of her husband's drinking problem.

20 13. Based on the foregoing allegations, Spielberg asserts causes of action against the
21 Roberts for Motor Vehicle General Negligence, Intentional Tort and Exemplary Damages.

22 14. Spielberg seeks compensatory and punitive damages from the Roberts in the
23 Underlying Action.

24 15. Upon information and belief, Mark Roberts pled no contest to a driving under the
25 influence violation.

26 **B. The Insurance Policies**

27 16. Upon information and belief, the Roberts' primary insurance carrier, GMAC
28

1 Insurance, has assumed their defense in the Underlying Action.

2 17. Upon information and belief, the primary policy issued by GMAC Insurance provides
3 limits of \$250,000.

4 18. National Fire issued Personal Catastrophe Liability policy number CPA 167048273
5 to Mark A. Roberts for the policy period from November 1, 2005 through November 1, 2006 (the
6 "Transcontinental Policy"), which was excess over the limits of the GMAC policy.

7 19. Although notice of the Underlying Action was provided to National Fire on or about
8 July 25, 2007, it was not until on or about June 2, 2008 that National Fire was advised by the
9 Roberts' defense counsel that the potential exposure of the Underlying Action could implicate the
10 limits of the Transcontinental Policy.

11 20. The Transcontinental Policy contains the following definition, in pertinent part:

12 21. **Insured** means:

13 a. **You;**

14 b. The following residents of **your** household:

15 (1) **Your** relatives:

16 (2) Any other person under the age of 21 in the care of **you** or **your**
17 **relatives;**

18 * * *

19 22. The Transcontinental Policy also contains the following exclusions, in relevant part:

20 **5. Intentional Acts**

21 **We** will not pay for or defend any claim or suit which results from **bodily**
22 **injury** or **property damage** which:

23 a. Arises from an act intended by an **insured**;

24 b. Arises from an **insured's** failure to act; or

25 c. Arises from an act which a reasonable person would expect to cause **bodily**
26 **injury** or **property damage**.

27 This applies even if the injury or damage is of a different degree or type than
28 actually intended or expected.

Mental disease, defect, or other disorder that an **insured** may have, or an

1 **insured's** being voluntarily or involuntarily under the influence of drugs or
2 alcohol, will not negate or modify the application of this exclusion. The
3 intention to cause **bodily injury**, or **property damage**, or the ability to reason
4 that **bodily injury** or **property damage** will be caused, shall be determined as
5 though any such mental disease, defect, or other disorder an **insured** may have
6 did not exist.

7 This exclusion does not apply where the **bodily injury** or **property damage**
8 arises from an **insured's** negligence or from an **insured's** use of reasonable
9 action to protect persons or property.

10 **6. Violation of Law**

11 We will not pay for or defend any claim or suit which results from **bodily**
12 **injury, personal injury, or property damage** arising from criminal acts by,
13 with the consent of, or at the direction of an **insured**.

14 **7. Punitive Damages**

15 We will not pay for or defend any claim or suit which results from **bodily**
16 **injury, personal injury, or property damage** assessed as punitive, exemplary,
17 or vindictive against an **insured** regardless of any other provision of this policy.

18 23. An actual and present controversy has arisen and now exists between plaintiff
19 National Fire and defendants Mark Roberts and Beverly Roberts concerning their respective rights
20 and obligations under the aforementioned Transcontinental Policy. Based upon the terms,
21 conditions and limitations set forth therein, National Fire contends that coverage for the claims
22 asserted by Spielberg against the Roberts is precluded by the foregoing exclusions.

23 24. National Fire believes and thereon alleges that Mark Roberts and Beverly Roberts
24 would dispute National Fire's contention regarding the lack of coverage for the Spielberg claim, and
25 therefore requires a judicial determination of the rights and obligations of the parties herein
26 regarding the underlying Spielberg claim.

27 25. National Fire desires a judicial determination and declaration of National Fire's and
28 Mark Roberts' and Beverly Roberts' rights and obligations under the Transcontinental Policy.
29 Specifically, National Fire seeks a declaration that National Fire is not obligated to indemnify Mark
30 Roberts and/or Beverly Roberts with regard to the underlying Spielberg claim.

31 ///

(Declaratory Judgment – Violation of Law Exclusion)

28. The Transcontinental Policy expressly precludes coverage for bodily injury or personal injury "arising from criminal acts by, with the consent of, or at the direction of an insured."

30. The allegations of the Underlying Action arise out of Mark Roberts' alleged criminal act of driving under the influence of alcohol and/or drugs.

32. Coverage for the Underlying Action is precluded by the Violation of Law exclusion in the Transcontinental Policy.

WHEREFORE, Plaintiff National Fire prays for judgment in its favor and against Defendant Mark and Beverly Roberts as set forth below.

(Declaratory Judgment – Intentional Acts Exclusion)

34. National Fire repeats, reiterates and realleges each and every allegation contained in

1 paragraphs 1 through 33 with the same force and effect as if fully set forth herein at length.

2 35. The Transcontinental Policy expressly precludes coverage for any claim which
3 "arises from an act intended by an insured; . . . arises from an insured's failure to act; or . . . arises
4 from an act which a reasonable person would expect to cause bodily injury or property damage."

5 36. The foregoing exclusion applies "even if the injury or damage is of a different degree
6 or type than actually intended or expected."

7 37. Furthermore, an insured's being voluntarily or involuntarily under the influence of
8 drugs or alcohol will not negate or modify the application of the Intentional Acts exclusion, and the
9 ability to reason that bodily injury or property damage will be caused shall be determined as though
10 any such condition did not exist.

11 38. The allegations of the Underlying Action arise from Mark Roberts' alleged act of
12 driving while under the influence of drugs and/or alcohol, which constitutes "an act which a
13 reasonable person would expect to cause bodily injury or property damage."

14 39. The allegations of the Underlying Action arise from Beverly Roberts' alleged "failure
15 to act" to prevent Mark Roberts' act of driving while under the influence of alcohol and/or drugs.

16 40. Coverage for the Underlying Action is precluded by the Intentional Acts exclusion in
17 the Transcontinental Policy.

18 41. By reason of the foregoing, National Fire seeks and is entitled to a declaration that it
19 has no obligation to defend or indemnify Mark Roberts or Beverly Roberts in connection with the
20 Underlying Action.

21 **WHEREFORE**, Plaintiff National Fire prays for judgment in its favor and against
22 Defendant Mark and Beverly Roberts as set forth below.

23 **COUNT THREE**

24 **(Declaratory Judgment – Punitive Damages Exclusion)**

25 42. National Fire repeats, reiterates and realleges each and every allegation contained in
26 paragraphs 1 through 41 with the same force and effect as if fully set forth herein at length.

27 ///

1 43. The Transcontinental Policy expressly precludes coverage for claims resulting from
2 bodily injury, personal injury or property damage "assessed as punitive, exemplary, or vindictive
3 against an insured."

4 44. The Underlying Action seeks recovery for exemplary damages against Mark and
5 Beverly Roberts.

6 45. An award of exemplary damages is uninsurable. Moreover coverage for such an award
7 is precluded by the Punitive Damages exclusion in the Transcontinental Policy.

8 46. By reason of the foregoing, National Fire seeks and is entitled to a declaration that it
9 has no obligation to defend or indemnify Mark Roberts or Beverly Roberts in connection with the
10 claim for exemplary damages in the Underlying Action.

11 **WHEREFORE**, Plaintiff National Fire Insurance Company of Hartford, Successor By
12 Merger To Transcontinental Insurance Company, prays for judgment in its favor and against
13 Defendants Mark and Beverly Roberts as follows:

- 14 (a) For a declaration that National Fire has no obligation to defend or indemnify Mark
15 Roberts or Beverly Roberts in connection with the Underlying Action;
16 (b) For its attorneys' fees and costs pursuant to law; and
17 (c) For such other relief as is just and equitable herein.

18
19 Dated: June 13, 2008

COLLIAU ELENUS MURPHY CARLUCCIO KEENER
& MORROW

21 By: Marsha L. Morrow
22 MARSHA L. MORROW
23 EDWARD J. TAFE
24 Attorneys for Plaintiff
25 NATIONAL FIRE INSURANCE COMPANY
26 OF HARTFORD, SUCCESSOR BY MERGERTO
27 TRANSCONTINENTAL INSURANCE COMPANY
28

DEMAND FOR JURY TRIAL

Plaintiff National Fire Insurance Company of Hartford, successor by merger to Transcontinental Insurance Company, hereby demands a jury trial as provided by Rule 38(b) of the Federal Rules of Civil Procedure.

Dated: June 13, 2008

COLLIAU ELENUS MURPHY CARLUCCIO KEENER
& MORROW

By: 

MARSHA L. MORROW

EDWARD J. TAFE

Attorneys for Plaintiff

NATIONAL FIRE INSURANCE COMPANY

OF HARTFORD, SUCCESSOR BY MERGERTO

TRANSCONTINENTAL INSURANCE COMPANY

CERTIFICATION OF INTERESTED PERSONS OR ENTITIES
[CIVIL LOCAL RULE 3-16]

Pursuant to Civil Local Rule 3-16, the undersigned certifies that, in addition to the parties named in this action, the following listed entities have a financial interest in the subject matter in controversy or in a party to the proceeding:

National Fire Insurance Company of Hartford, successor by merger to Transcontinental Insurance Company, is owned by Continental Casualty Company, which itself is owned by The Continental Corporation, which is not publicly traded. The Continental Corporation is owned by CNA Financial Corporation, which has issued shares to the public. Loews Corporation, a publicly traded company, owns the majority of the stock of CNA Financial Corporation. No other corporation owns 10% or more of the stock of CNA Financial Corporation.

Dated: June 13, 2008

COLLIAU ELENIOUS MURPHY CARLUCCIO KEENER
& MORROW

By:

Marsha L. Morrow
MARSHA L. MORROW

EDWARD J. TAFE

Attorneys for Plaintiff

NATIONAL FIRE INSURANCE COMPANY

OF HARTFORD, SUCCESSOR BY MERGERTO

TRANSCONTINENTAL INSURANCE COMPANY